

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	
)	
DAVID M. WHISNANT)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
RESPONDENT)	CASE NUMBER WPC07-0246
)	

DIRECTOR’S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed director of the Division of Water Pollution Control by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the “division” and the “department” respectively).

II.

David M. Whisnant (hereinafter “the Respondent”) is the owner and developer of Carpenters’ Ridge, a residential subdivision located on Ball Camp Pike in Knox County (hereinafter “the site”). Service of process may be made on the Respondent at P.O. Box 7365, Knoxville, TN 37921.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the “Act”), has occurred,

or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined by T.C.A. § 69-3-103(20) and as herein described, has violated the Act.

V.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (TNCGP) may be obtained by submittal of a Notice of Intent (NOI), a site specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

VI.

The unnamed tributary to Beaver Creek and Beaver Creek described herein, are “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for

suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife. Additionally, Beaver Creek is listed as impaired for loss of biological integrity due to siltation.

FACTS

VII.

On April 28, 2005, a NOI, SWPPP, and appropriate fee were submitted to the Knoxville Environmental Field Office (K-EFO) by Eagle Bend Properties, LLC, requesting coverage under the TNCGP for construction activities at the site. Mr. Scott Davis, President of Eagle Bend Properties, LLC, signed the NOI. No contractors were identified on the NOI. Coverage under the TNCGP was issued May 9, 2005.

VIII.

On January 11, 2007, division personnel conducted a complaint investigation at the site and noted that the Erosion Prevention and Sediment Control (EPSC) measures shown on the lot level SWPPP submitted with the NOI were not being implemented. Eroded material was migrating from unstable building lots, soil stockpiles, and cleared areas into the unprotected storm sewer and into an unnamed tributary to Beaver Creek. The Notice Of Coverage (NOC) and SWPPP were not available as required by the TNCGP.

IX.

On February 5, 2007, the division issued an Expedited Director's Order (EDO) to Eagle Bend Properties, LLC, for the violations noted during the January 11, 2007, complaint investigation. This order assessed a Civil Penalty in the amount of \$4,500.00 (FOUR THOUSAND FIVE HUNDRED DOLLARS). Scott Davis acknowledged receipt of this order on February 7, 2007.

X.

On February 27, 2007, the division received an amended NOI, which the Respondent had signed as the primary contractor at the site.

XI.

On March 6, 2007, the division conducted a site inspection and noted improvement in the implementation of EPSC measures. On March 7, 2007, the division issued correspondence to the Respondent noting these improvements and requesting the implementation of additional EPSC measures. The Respondent was also instructed to submit an amended NOI reflecting the ownership change of the site from Eagle Bend Properties, LLC, to the Respondent.

XII.

On March 8, 2007, Eagle Bend Properties, LLC, submitted a check in the amount of \$2,250.00 (TWO THOUSAND TWO HUNDRED AND FIFTY DOLLARS) along with the signed Waiver of Right to Appeal.

XIII.

On June 8, 2007, the division received a formal complaint, which alleged that violations of the Tennessee Water Quality Control Act were occurring at the site. This complaint included photographs showing sediment laden water flowing off site and into the unnamed tributary to Beaver Creek. The division informed Eagle Bend Properties of this complaint in correspondence dated June 27, 2007, based on the then current NOI.

XIV.

On August 10, 2007, the division conducted a site investigation in response to the formal complaint received June 8, 2007. Division personnel noted that inadequate EPSC measures were allowing eroded material to continue to migrate into the unprotected storm sewer system and into the unnamed tributary to Beaver Creek. Lot level EPSC measures were not being implemented as required by the SWPPP and soil stockpile areas were not stabilized.

XV.

On August 13, 2007, the division issued a Notice of Violation (NOV) to Eagle Bend Properties, LLC, for the violations noted during the August 10, 2007 complaint investigation. The NOV requested Eagle Bend Properties, LLC to implement corrective measures to prevent additional soil loss from the site. Additionally, Eagle Bend Properties, LLC, was instructed to have the Respondent submit a NOI as owner of the site and to submit a Notice of Termination (NOT) indicating a change of site ownership from Eagle Bend Properties, LLC, to the Respondent. Blank NOI and NOT forms were enclosed and the NOV was copied to the Respondent.

XVI.

On August 24, 2007, the division received a NOT, which indicated a change in ownership of the site from Eagle Bend Properties, LLC, to the Respondent. Also on this date, the Respondent submitted an NOI reflecting the change of ownership.

XVII.

On September 11, 2007, and on October 5, 2007, division personnel conducted site inspections. On both dates, division personnel noted that inadequate EPSC measures were continuing to allow eroded material to migrate off of unstable building lots and soil stockpile areas, into the unprotected storm sewers and into the unnamed tributary to Beaver Creek.

XVIII.

On October 10, 2007, the division issued a NOV to the Respondent for the violations observed during the September 11, 2007, and October 5, 2007, site inspections. The Respondent was instructed to implement corrective measures as necessary to comply with the terms and conditions of the TNCGP.

XIX.

During the course of investigation, the division incurred DAMAGES in the amount of TWO HUNDRED FIFTY FIVE DOLLARS AND FIFTY FOUR CENTS (\$255.54).

VIOLATIONS

XX.

By failing to comply with the terms and conditions of the TNCGP, the Respondent has violated T.C.A. §§ 69-3-108(b) and 114(b), which state in part:

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XXI.

By causing a condition of pollution in the unnamed tributary to Beaver Creek, the Respondent has violated T.C.A. Section 69-3-114(a).

T.C.A. § 69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XXII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondent.

1. The Respondent shall, within 7 days of receipt of this ORDER, establish effective EPSC measures on-site such that sediment is not allowed to leave the site or enter waters of the state.
2. The Respondent shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.
3. The Respondent shall, within 7 days of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place. The Respondent shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the KEFO at 3711 Middlebrook

Pike, Knoxville Tennessee 37921, and a copy of the written documentation and photographic evidence to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.

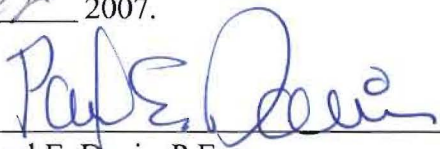
4. The Respondent shall pay DAMAGES to the division in amount TWO HUNDRED FIFTY FIVE DOLLARS AND FIFTY FOUR CENTS (\$255.54) within 30 days of receipt of this ORDER.
5. The Respondent shall pay a CIVIL PENALTY of TWENTY THREE THOUSAND DOLLARS (\$23,000.00) to the division, hereby ASSESSED to be paid as follows:
 - a. The Respondent shall, within 30 days of entry of this ORDER, pay a CIVIL PENALTY in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500.00).
 - b. If the Respondent fails to comply with Part XXII, item 1 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of SIX THOUSAND FIVE HUNDRED DOLLARS (\$6,500.00), payable within 30 days of default.
 - c. If the Respondent fails to comply with Part XXII, item 2 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of SIX THOUSAND FIVE HUNDRED DOLLARS (\$6,500.00), payable within 30 days of default.
 - d. If the Respondent fails to comply with Part XXII, item 3 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of SIX THOUSAND FIVE HUNDRED DOLLARS (\$6,500.00), payable within 30 days of default.

The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 30th day of November 2007.



Paul E. Davis, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.